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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 679

ROBERT-ARTHUR MANAGEMENT CORPORATION,
Appellant,

against

STATE OF TENNESSEE, EX REL. PHIL M. CANALE,
District Attorney General,
Appellee.

On Appeal from the Supreme Court of the State of Tennessee.

STATEMENT AS TO JURISDICTION.

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OPINIONS BELOW.

The Supreme Court of Tennessee wrote an opinion which is appended hereto as Appendix A, and which is reported in 414 South Western Reporter, 2d 638. The Trial Court wrote a finding of facts which is attached as Appendix B.

JURISDICTION.

(i) This case arises from a permanent injunction entered in the Criminal Court of Shelby County, Tennessee, which found the movie "Mondo Freudo" and the trailer advertisement "Olga's Girls" obscene and permanently enjoined the further or future showing of said film pursuant to Tennessee Code Annotated, 39-3005 (c). The Court decreed that the Appellant would surrender to the Sheriff of said Shelby County the film and trailer until further orders of the Court, an appeal being prayed by the Appellant.

(ii) The Supreme Court of Tennessee on March 27, 1967, rendered an opinion affirming the judgment of the lower court. Appendix A, post 17. A timely petition to rehear was filed in the Supreme Court of Tennessee which was entertained and considered on the merits by that Court and the Petition to Rehear was denied on May 15, 1967, and, as customary, the denial of the Petition to Rehear was added to the Supreme Court opinion, Appendix A, post 25. The judgment of the Tennessee Supreme Court was filed for entry on May 26, 1967, and is attached as Appendix C together with the statement of the Clerk certifying the judgment and the timeliness of the Petition to Rehear.

The Notice of Appeal was filed on August 11, 1967, in the Supreme Court of Tennessee, the court possessed of the record.

(iii) The jurisdiction of this Court is conferred by 28 U. S. C., Section 1257 (2).

(iv) The following decisions sustain the jurisdiction of this court to review judgments by appeal in this case: **Winters v. New York**, 333 U. S. 507; **Jacobellis v. State of Ohio**, 378 U. S. 184; **Mishkin v. State of New York**, 383

U. S. 502; **Department of Banking v. Pink**, 317 U. S. 264, 266; **Redrup v. State of New York**, ... U. S. ..., 87 Sup. Ct. 1414; **Bowman v. Loperena**, 311 U. S. 262, 266.

STATUTES INVOLVED.

The statute involved is Chapter 93 of the Public Acts of Tennessee 1965, T. C. A. 39-3005-3007, which reads as follows:

"39-3005. Injunction against sale or distribution—The circuit, chancery, and criminal courts of this state have jurisdiction to enjoin the sale or distribution of obscene material as hereinafter specified:

(a) The district attorney-general, in any district where a person, firm or corporation sells, distributes, exhibits or displays, or is about to sell, distribute, exhibit, or display, or has in its possession with the intent to sell, distribute, exhibit or display any material which is obscene, as hereinafter defined, may maintain an action for an injunction against such person, firm or corporation in the circuit, chancery or criminal court of the county in which said sale, distribution, exhibition, display or possession occurred, and to prevent such sales, distribution, exhibition or display or further sales, distribution, exhibition or display, or the further acquisition of any such material.

(b) Any person, firm or corporation made a defendant in any suit for injunction filed under this section shall be entitled to a trial by the court without intervention of a jury. Where a temporary injunction has been issued, trial shall be held within two (2) days after joinder of issues and in such instances the court shall render its decision within two (2) days after the conclusion of the trial.

(c) In the event that a final decree permanently enjoins the defendant, such final decree shall direct the defendant to surrender to the sheriff of the county all of the obscene material, the sale, distribution, exhibition, display or possession of which is enjoined, and the decree shall direct the sheriff to seize and destroy such obscene material.

(d) The review of any final decree shall be by broad appeal direct to the Supreme Court. Any party, including the district attorney-general, shall be entitled to an appeal from an adverse decision of the court. The granting of an appeal shall have the effect of staying or suspending any order to destroy but not any order to seize such material, nor shall the granting of an appeal suspend any permanent injunction granted by the trial court.

(e) The district attorney-general shall not be required to file any injunction, cost or appeal bond. (Acts 1965, ch. 93, § 1.)"

"39-3006. Admissible evidence in action or prosecution—In any action or prosecution under §§ 39-3003 or 39-3005 or any laws of this state wherein the question of the obscenity of any material is an issue, it shall be admissible in evidence, among other things, to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) What the predominant appeal of the material would be for ordinary persons; and what effect, if any, it probably would have on the conduct of such persons;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(f) the good repute of the author, creator, publisher or other person from whom the material originated, which evidence of good repute may be rebutted by the prosecution.

Expert testimony relating to factors entering into the determination of the issue of obscenity shall be admissible, including the testimony of the author, creator, publisher, or other person from whom the material originated. (Acts 1965, ch. 92, § 3; 1965, ch. 93, § 3)"

"39-3007. Definition of obscene material—The following definition shall control in construing §§ 39-3003-39-3008:

Obscene material: Any material, matter, object or thing, including but not limited to, any written or printed matter, film, picture, drawing, or any object or thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if in addition, (a) it is patently offensive to the public or if it goes substantially beyond customary limits of candor in describing or representing such matters, and (b) it is devoid of any literary, scientific or artistic value and is utterly without social importance. The phrase 'predominant appeal' shall be considered with reference to ordinary persons. (Acts 1965, ch. 91, § 2; 1965, ch. 92, § 2; 1965, ch. 93, § 2.)"

QUESTIONS PRESENTED.

1. Is Chapter 93 Public Acts of Tennessee 1965 (T. C. A. 39-3005-3007) invalid in that on its face and as applied it impairs the freedom of expression protected by the

First and Fourteenth Amendments to the Constitution of the United States in that it operates as a forbidden prior restraint on expression?

2. Is the statute in question invalid on its face or as applied in that it fails to contain procedural safeguards necessary under the First and Fourteenth Amendments to the Constitution of the United States?

3. Was Chapter 93 of the Public Acts of Tennessee 1965 (T. C. A. 39-3005-3007) unconstitutionally applied in violation of the First and Fourteenth Amendments in that:

a. The Court enjoined the showing of the movie film entitled "Mondo Freudo" "or any other film or trailer until final determination of this cause".

b. There was no notice of Application for the injunction but an ex parte hearing.

c. There was no judicial determination of obscenity in an adversary hearing before issuance of the temporary injunction.

d. The temporary injunction was broader than the statute, closed the theater for all purposes and applied to any future unidentified films.

4. Was Chapter 93, Public Acts of Tennessee 1965 (T. C. A. 39-3005-3007) unconstitutionally applied in violation of the First and Fourteenth Amendments in that upon motion of counsel for appellant to confine the injunction to the named movie, the Trial Court modified the injunction to include Mondo Freudo and "any other adult-type movie" and only some ten days later modified the injunction to limit it to the named movie and trailer?

5. Was the Fourteenth Amendment violated by the Appellee's failure to introduce competent evidence that the film was obscene?

6. Is Chapter 93 of the Public Acts of Tennessee (T. C. A. 39-3005-3007) invalid on its face and as applied in that it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States in that it is vague and uncertain?

7. Was the Fourteenth Amendment violated by the Trial Court's decision being partly based on factual evidence adduced at the ex parte preliminary hearing?

STATEMENT.

The State of Tennessee on relation of Phil M. Canale, the District Attorney General of Shelby County, Tennessee, commenced this action for a Civil injunction in the Criminal Court of Shelby County, Tennessee, under Chapter 93 of the Public Acts of 1965, particularly T. C. A. 39-3005 against the Appellants who are the operators of a motion picture theater in Memphis, Tennessee. The petition sought a temporary injunction restraining and prohibiting the defendant from the further showing "**of the movie film entitled 'Mondo Freudo' or any other film or trailer until final determination of this cause**". The Petition further requested an injunction prohibiting the disposal of any film in possession of the defendant and restraining any further acquisition of any such material and requested the injunction be made permanent and that the obscene material be turned over to the Sheriff of Shelby County for destruction. This Petition was brought on May 20, 1966, and the Court, in an ex parte hearing, granted the temporary injunction restraining the defendant from making further acquisitions of any such material or disposing of any in their hands and enjoining the defendant "**from the further showing of the movie film entitled Mondo Freudo or any other film or trailer until final determination of this cause**" (Technical Record

7). Appendix D. After service of the injunction on the theater and on the same day, May 20th, counsel for Appellant appeared before the Court in chambers and delivered a Motion to Dissolve Injunction Except as to Mondo Freudo which was filed with the clerk on May 24, 1966, and the Court modified the temporary injunction and issued an order prohibiting the showing of the movie film entitled **Mondo Freudo or any other "adult type" movie** and continued the injunction on disposing of any film in Appellant's possession (Technical Record 9). Appendix E.

On May 27, 1966, Appellant filed a Motion to Dismiss Petition for Injunction and to Dissolve Injunction (Technical Record 18) and an Additional Motion to Dismiss Petition for Injunction and to Dissolve Injunction filed May 28, 1966 (Technical Record 30), and these motions were heard by the Court on June 1, 1966. The Court denied the motions but modified the injunction again on June 1, 1966, so that the injunction as modified prohibited Appellant from further showing the movie "Mondo Freudo" or the movie "Olga's Girl" and from disposing of Mondo Freudo, and eliminated any restriction on showing of any "adult type" movie. The Order was entered June 15, 1966 (Technical Record 68). Appendix F.

The Motion to Dissolve the Injunction Except as to Mondo Freudo, the Motion to Dismiss the Petition and Dissolve Injunction and the Additional Motion all challenged the constitutionality of the statute on its face and as applied (Technical Record 10, 18, 30).

The Appellant answered, denied the obscenity of the movie and challenged the constitutionality of the statute on its face and as applied (Technical Record 43).

The cause came on for trial before the Court on June 15, 1966, which found the movie to be obscene and en-

joined its showing and distribution. The Order directed the Appellant to surrender the film and trailer to the Sheriff of Shelby County and granted the Appellant an appeal to the Supreme Court of Tennessee.

The Appellant appealed to the Supreme Court of Tennessee which affirmed the judgment of the lower Court although it admitted the issuance of the Temporary injunction was error, but was harmless error since Counsel for the Appellant acted immediately and the Court corrected the injunction (Appendix A). The Appellant made a timely application for rehearing in the Tennessee Supreme Court which was denied on the merits (Appendix C), and the judgment was entered on May 26, 1967 (Appendix C).

STAGE AND MANNER OF RAISING FEDERAL QUESTIONS.

The questions here presented were raised in the Trial Court by the Motions filed by the Appellant (Technical Record 10, 18, 30) by the Answer (Technical Record 43), by objections during the trial (R. 5-11), by the Petition to Rehear or Motion for New Trial filed in the Trial Court (Technical Record 79). The questions here presented were also raised in the Supreme Court of Tennessee and the Supreme Court of Tennessee passed upon these questions (Appendix A).

THE QUESTIONS ARE SUBSTANTIAL.

A. The statute was unconstitutionally applied by the issuance of a temporary injunction closing the theater. The Petition requested and the Court enjoined the "**showing of the movie film entitled 'Mondo Freudo' or any other film or trailer until final determination of this cause**" (Appendix D).

The record clearly indicates that showing at the theater along with the film Mondo Freudo was a conventional war picture. No mention is made of this picture in the Petition nor at the application for the temporary injunction and the Court merely granted the Petition closing the theater. A motion was made by counsel for appellant on that same day to dissolve the injunction except as to the movie "Mondo Freudo". The Court in chambers on the same day that the temporary injunction was granted did modify the temporary injunction so as to prohibit the defendant from showing "Mondo Freudo" or any other "adult type" movie so that the injunction still applied against unnamed films. The appellant filed another motion to dismiss the Petition for Injunction and to dissolve the injunction which was heard by the Court on June 1. The Court on June 1, which was some ten days after the original temporary injunction, did modify the injunction for the second time to prohibit the defendant from showing only the movie "Mondo Freudo" and the trailer named at the hearing for the temporary injunction and removed the restriction on the defendant against showing any adult type films.

Appellant contends that the issuance of the original temporary injunction was not harmless error regardless of the subsequent modifications but prejudicial error requiring reversal and the Court action violated the First, Fifth and Fourteenth Amendments of the Federal Constitution.

The Tennessee Supreme Court admits that the issuance of the original temporary injunction was error but harmless error stating:

> "The temporary injunction, when first issued, enjoined Robert-Arthur Management Corporation from further showing of the film 'Mondo Freudo' or any other film or trailer. Insofar as this injunction ap-

plied to 'any other film or trailer' it was in error. The operation and affect of this was to prohibit the showing of future films and when the statute here at issue is applied in this manner, it is an unconstitutional application of the statute. **Kingsley Books v. Brown,** *supra.* Counsel for Robert-Arthur Management Corporation, on the same day the temporary injunction was issued, entered a motion to correct the injunction and have it apply only to the film 'Mondo Freudo'. The Trial Judge, in chambers, immediately made this correction. Under these facts, we think the error was harmless error."

414 S. W. 2d at 642.

The Court has not fully set out the facts which show that it was some ten days before the injunction was modified to restrict it to Mondo Freudo only and that the Petition was for the closing of the entire theater. The Petition appears similar to the one filed in **New Riviera Arts Theatre v. State,** ... Tenn. ..., 412 S. W. 2d 890 (Feb. 18, 1967), which was decided about one month before the decision in this action. The temporary injunction sought by the Petition and granted by the Trial Court both in this case and the case involving New Riviera Arts Theatre enjoined the showing of any and all films obscene or otherwise. The Tennessee Supreme Court held the application of the statute as unconstitutional in the New Riviera Arts Theatre case stating:

"The granting of the temporary injunction prohibiting the defendants from showing any film had the effect of closing the theater and was an unconstitutional application of the statute in violation of defendant's constitutional rights of freedom of speech and due process."

. . . . . .

"We agree the application of the statute sought by the Petition was unconstitutional in violation of

defendant's rights under the First, Fifth and Fourteenth Amendments to the Federal Constitution."

412 S. W. 2d at 893-894.

Appellant contends reversal is required in this case.

B. The statute was unconstitutionally applied by the issuance of a temporary injunction in an ex parte hearing. The appellant contends that the issuance of a temporary injunction at an ex parte hearing is a prior restraint in violation of the First and Fourteenth Amendments to the Constitution of the United States. It is contended that there must be a judicial determination of obscenity following notice and adversary hearing before a temporary injunction may be granted.

The appellant is a commercial motion picture theater which receives films which have travelled freely throughout the United States. The particular film in question had played in some 65 other cities throughout the United States and for one week at another theater in Memphis before delivery to the appellant. Motion pictures are not kept in a theater as inventory like a merchant's stock of goods. The theater has advertised the motion picture and without notice it is enjoined. Ordinarily, it would have no other films until it can secure one from some source.

Appellant contends that to afford protection from censorship or prior restraint, two things must be done. There must be a determination that the material is obscene and there must be a hearing so that the material may be defended prior to restraint. In **A Quantity of Books v. Kansas**, 378 U. S. 205, the Court cites **Tenney v. Liberty News Distributors**, 13 App. Div. 2d 770, 215 N. Y. S. 2d 663 that the New York Injunctive procedure there sustained does not afford ex parte relief but postpones all injunctive relief until "both sides have had an opportunity to be heard". It is further pointed out in **Kingsley**

Books v. Brown, 354 U. S. 436, involving the New York statute, that the book sellers were ordered to show cause within four days why they should not be enjoined pendente lite and that the book sellers consented to the granting of the temporary injunction. There was notice and a chance for an adversary hearing which was waived by the book sellers.

The Tennessee Supreme Court here states that the injunction is permissible as it limits the status quo for the shortest possible time. The State has the burden; the Judge may exercise an independent check; and under the statute it is possible though the Court admits not probable, to have the entire matter fully disposed of within four days.

Status quo is the existing state of things at a given date and the last non-contested condition which proceeded the pending controversy. The maintaining of the status quo would be the continued allowance of the pictures to be shown on the screen pending a decision.

When there is no adversary hearing, what burden is there upon the state? When the Trial Judge has only the petition and any witnesses presented by the State, what independent check does he exercise? The admitted improbability of a speedy hearing within four days is evidence of prior restraint.

The statute provides for no notice prior to the granting of the temporary injunction. However, appellants admit that where a statute does not provide for notice required by due process, a requirement will be read into the statute by the Court in order to uphold its validity.

The granting of a temporary injunction at an ex parte hearing is prior restraint infecting the whole proceedings and requiring reversal. The Petition and the action of the Court operated solely as a suppression of free speech. The unconstitutional application of the statute by the

issuance of an ex parte temporary injunction without an adversary hearing was a violation of the Fourteenth Amendment to the Federal Constitution rendering all subsequent proceedings tainted and void. We believe this to be the teaching of **Marcus v. Search Warrant of Property**, 367 U. S. 717, and **A Quantity of Books v. Kansas**, 378 U. S. 205, and has been followed in such decisions as **Phoenix v. Fine**, 420 Pac. 2d 26 (Arizona, November 7, 1966).

C. The statute is unconstitutional on its face. It operates as a forbidden prior restraint upon expression and does not contain procedural safeguards necessary under the First and Fourteenth Amendments to the Constitution of the United States.

There is no procedure in the statute assuring a speedy appellate review. The statute provides for a broad appeal to the Supreme Court of Tennessee, but there is no provision which would expedite the hearing.

The statute provides for no speedy hearing when no temporary injunction is sought. There is the chilling effect of a Petition for a permanent injunction and no requirement that the matter be set for a speedy hearing. In fact, there is no requirement that the Court set the hearing within any particular time after the answer has been filed. The party against whom the injunction is sought would act at his peril in the continued sale, distribution or exhibition of the material during the time that the action is pending. Further, when no temporary injunction is sought, the court may hold the matter under advisement and has no time limit in which it must render a decision.

The statute provides for no notice when a temporary injunction has been requested and the statute sanctions prior restraint of expression.

D. The Court considered in its final ruling factual evidence adduced at the ex parte hearing for the temporary injunction (App. D). The Court in the hearing and also in his findings of fact stated that certain factual testimony was adduced at the hearing for the petition for the temporary injunction. Appellant was not present and had no opportunity to cross-examine the witnesses or present proof to refute the testimony.

E. The Court in permitting the witnesses for the Petitioner to testify as experts unconstitutionally applied the statute. The statute provides that expert testimony relating to the factors entering into the determination of the issue of obscenity shall be admissible. The Court allowed the petitioner to present six witnesses who testified as experts over objections of the appellant and gave their opinions on obscenity. These witnesses were patently unqualified. Most of the witnesses testified that the pictures in Playboy or the picture of a woman nude to the waist was obscene. This prejudiced the appellant and the judgment should not stand since the Court would be unable to say that the introduction of the so-called expert testimony from a patently unqualified witness did not prejudice the appellant.

F. The statute is invalid on its face in that it is vague and uncertain impairing the freedom of expression protected by the First and Fourteenth Amendments. Appellant believes the vice of overbroadness infects the statute. The lack of procedural safeguards both when a temporary injunction is granted or not granted, lack of timely appellate review and other deficiencies heretofore pointed out make the statute void for vagueness.

CONCLUSION.

Substantial and novel federal questions are found in this case which should be reviewed by this Court. The most significant ones are:

(1) The issuance of a temporary injunction in an ex parte hearing;

(2) The admitted error in enjoining the showing of all films thereby closing the theater which is called harmless error by the Court because of the subsequent modification enjoining only "adult type films" and ten days later modifying the injunction to include only the one particular movie named in the petition for injunction;

(3) The lack of precedural safeguards in the statute making it invalid on its face; and

(4) The consideration by the Court of evidence on the preliminary hearing and the admission of testimeny of witnesses patently unqualified as experts.

The appellant contends that any one of the issues is substantial enough to warrant the noting of probable jurisdiction. When considered collectively, they are even more compelling for review by this Court.

Respectfully submitted,

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APPENDIX A.

Robert-Arthur Management Corporation,

Appellant,

vs.

State of Tennessee, ex rel. Phil M. Canale, Jr.,

Appellee.

Shelby Criminal.

Opinion.

The constitutionality of a statutory scheme prohibiting obscene materials, by use of the injunctive process, is at issue here. This statute, enacted by Chapter 93 of the Public Acts of 1965, is now carried in Tennessee Code Annotated as Sections 39-3005, 39-3006 and 39-3007. Under this statute the Criminal Court of Shelby County found the motion picture film "Mondo Freudo" and an advertising trailer "Olga's Girls" to be obscene. The appeal here is by the exhibitor of the film and trailer, Robert-Arthur Management Corporation.

Under the Constitution of the United States obscenity is excluded from constitutional protection since it is utterly without redeeming social importance. **Alberts v. State of California**, 354 U. S. 476, 77 S. Ct. 1304 (1957); **Jacobellis v. State of Ohio**, 378 U. S. 184, 84 S. Ct. 1676 (1964). Likewise under the Constitution of the State of Tennessee obscenity has no protection. Also motion picture films are within the basic protection of the First and Fourteenth Amendments to the Constitution of the United States. **Kingsley International Picture Corp. v. Regents of University of State of New York**, 360 U. S. 684, 79 S. Ct. 1362 (1959). We make these statements, not to decide the issues before us, but to clearly define the issues raised.

The first constitutional objection to this statute is on the ground it allows restraint of the alleged obscene material prior to an adversary hearing on the underlying issue. This statute does allow prior restraint since it allows a temporary injunction. The seriousness of this issue is expressed by the United States Supreme Court in **Bantam Books, Inc. v. Sullivan,** 372 U. S. 70, 83 S. Ct. 639 wherein it was said, "any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."

The statute at issue, where a temporary injunction has been issued, makes mandatory a trial on the issue of obscenity within two days after joinder of issues and a final decision of the court within two days after the conclusion of the trial. This statute, on the issue of prior restraint, is almost identical with the New York statute, on the same subject, dealt with by the United States Supreme Court in **Kingsley Books, Inc. v. Brown,** 354 U. S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957). The New York statute required trial within one day after joinder of issue and a decision within two days of the conclusion of the trial. The court in **Kingsley Books** upholding the validity of the statute said:

> Neither in the New York Court of Appeals, nor here, did appellants assail the legislation insofar as it outlaws obscenity. The claim they make lies within a very narrow compass. Their attack is upon the power of New York to employ the remedial scheme of Sec. 22-a. Authorization of an injunction pendente lite, as part of this scheme, during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which "adequate notice, judicial hearing, and fair determination are assured, . . ., is a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene matter. It is a brake on the

temptation to exploit a filthy business offered by the limited hazards of piecemeal prosecutions, sale by sale, of a publication already condemned as obscene . . . Resort to this injunctive remedy, it is claimed, is beyond the constitutional power of New York in that it amounts to a prior censorship of literary product and as such is violative of that freedom of thought, and speech which has been withdrawn by the Fourteenth Amendment from encroachment by the states".

The judicial angle of vision in testing the validity of a statute like Sec. 22-A is "the operation and effect of the statute in substance". Id. 283 U. S. at 713. The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties "What is needed", writes Professor Paul Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis". 354 U. S. 441.

The case of **Freedman v. State of Maryland,** 380 U. S. 51, 85 S. Ct. 734 (1965), dealt with statutes creating a State Board of Censors. On the issue of prior restraint the requirement to submit a film to a censor, prior to exhibiting same, is analogous to a temporary injunction prohibiting the showing of the film. In both cases there is some restraint prior to an adversary hearing on the underlying issue. In the **Freedman** case the Court said:

The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expres-

> sion, only a procedure requiring a judicial determination suffices to impose a valid final restraint . . . Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. 380 U. S. 60.

The First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth, in effect guarantees to the people the right of free expression in order that there may be a full and unrestricted interchange of ideas for bringing about any political and social changes desired by the people. This amendment gives protection to all ideas, no matter how unorthodox or controversial, so long as they have the slightest redeeming social importance. What we are weighing here is the right of the State to maintain a decent society against the right of individuals to express themselves freely. In doing so we move in a sensitive area. The issue here is whether this statute, by its operation and effect, has adequate procedural safeguards to properly protect, in this sensitive area, against constitutionally protected expression. We think this statute provides such adequate safeguards for the following reasons.

First: The State (acting through a district attorney-general) carries the burden to show the material sought to be proscribed is not material protected by the First Amendment to the Constitution of the United States. Second: The trial judge can exercise an independent check on the judgment of the district attorney-general at a point before any restraint takes place. Third: Upon issuance of a temporary injunction the date of joinder of issues is within the discretion of the party charged. Under this statute it is possible (though we admit not probable) to have the entire matter, including a decision on the under-

lying issue, fully disposed of within four days. This limits the status quo for the shortest possible time.

Error is assigned to the action of the trial judge in allowing State witnesses to be qualified relative to local (Shelby County, Tennessee) contemporary community standards rather than national contemporary community standards. In the leading case of **Roth v. United States,** 354 U: S. 476, 77 S. Ct. 1304 (1957), the test of obscenity is stated to be "whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to the prurient interest." The issue is whether "community" as the word is used in determining standards of decency means the local standard as opposed to the national standard. Since the suppression of freedom of expression must pass muster of a Federal Constitution the standards used to determine obscenity must of necessity be the national standard. **Jacobellis v. Ohio,** 378 U. S. 184, 84 S. Ct. 1676 (1964); **State v. Vollmar,** 389 S. W. 2d 20 (Mo. 1965).

When the first State witness was offered objection was made to his testimony unless it could be shown he had knowledge of the standards of decency based on the national standard. The trial judge, in overruling the objection, stated it was relevant to know the local standard and it might also be relevant to know the national standard. This witness to show his knowledge of the standards of decency, among other things, stated: (1) he normally viewed television and some movies; (2) he had seen stage shows in Chicago and New York City; (3) he read books and novels; (4) he had been a reporter and photographer on a local daily newspaper for eight years; and (5) he had knowledge national magazines and paper back books dealing with sex were on sale at news stands. We think from these facts it could be found this witness had knowledge of the national standards of decency. Upon com-

pletion of this witness's testimony the trial judge asked him if he had any reason to believe the local standards would be any different from the national standard. The witness did not give a direct affirmative or negative answer to this question but did state in substance he thought the feelings of the local people on this matter, taking a large cross-section of the local community, would be the same as a large cross-section of the national community. We think, under this evidence, the trial judge could find the local standards of decency were essentially the same as the national standard. Further, the trial judge viewed the films and his findings do not indicate he used local standards of decency.

We think and so hold that where it is shown the local standards of decency are essentially the same as the national standards, then it is not error to qualify a witness relative to local community standards.

The temporary injunction, when first issued, enjoined Robert-Arthur Management Corporation from further showing of the film "Mondo Freudo" or any other film or trailer. Insofar as this injunction applied to "any other film or trailer" it was in error. The operation and effect of this was to prohibit the showing of future films and when the statute here at issue is applied in this manner it is an unconstitutional application of the statute. **Kingsley Books v. Brown**, supra. Counsel for Robert-Arthur Management Corporation, on the same day the temporary injunction was issued, entered a motion to correct the injunction and have it apply only to the film "Mondo Freudo." The trial judge, in chambers, immediately made this correction. Under these facts we think the error was harmless error.

We find the statute here in question to be valid statute both under the Constitution of the State of Tennessee and under the Constitution of the United States; and we

also find this statute, in the case at bar, was not applied in an unconstitutional manner.

The exhibitor of the film here in question challenges the finding of the trial judge that the film "Mondo Freudo" was in fact obscene. The statute in question defines obscene material as follows:

> Obscene material: Any material, matter, object or thing, including but not limited to, any written or printed matter, film, picture, drawing, or any object or thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if in addition (a) it is patently offensive to the public or if it goes substantially beyond customary limits of candor in describing or representing such matters, and (b) it is devoid of any literary, scientific or artistic value and is utterly without social importance. The phrase "predominant appeal" shall be considered with reference to ordinary persons. T. C. A. 39-3007.

Under the above statute there are three separate elements which must be found, independently of each other, to support a finding a material is obscene. For example, if a material have only a modicum of social value, then such material cannot be found obscene even though it be patently offensive to the public. **A Book Named "John Cleland's Memories of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts,** 86 S. Ct. 975 (1966). The trial judge applied these three elements independently in finding this film to be obscene.

Since this case was tried without a jury the scope of review here is governed by T. C. A. 27-303 and 27-304, which makes any issue of law or fact tried here de novo upon the record of the trial court accompanied by a presumption of the correctness of the judgment of the trial

court, unless the preponderance of the evidence is otherwise. **Kernodle v. Peerless Life Ins. Co.**, 213 Tenn. 631, 376 S. W. 2d 744 (1964).

The State offered six witnesses all residents of Shelby County, Tennessee, consisting of an investment salesman, personnel director of a hospital, two housewives, a real estate salesman and a medical doctor. The testimony of these witnesses was substantially the same. They all testified, under the three elements set out in T. C. A. 39-3007, the films in question were obscene.

The Robert-Arthur Management Corporation offered as witnesses two officers of the corporation one residing in Atlanta, Georgia, and the other in New Orleans, Louisiana; a psychiatrist and a psychologist both residents of Memphis, Tennessee; a theatre manager residing in Memphis, Tennessee; a movie reviewer residing in Atlanta, Georgia; a booking agent residing in Atlanta, Georgia; and a lawyer residing in Memphis Tennessee. The testimony of these witnesses was on all points in direct conflict with the witnesses offered by the State.

The film "Mondo Freudo" was entered in evidence and seen by the trial judge. There was also a stipulation the movie "Mondo Freudo" had already played in some sixty-five other cities through the United States.

We have reviewed the evidence and have seen the film. We agree with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We

presume the argument to be, since sexual filth does exist, and this film only informs people of such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific or artistic value and utterly without social importance.

We have considered all the assignments of error and find them without merit. The judgment of the trial court is affirmed.

Ross W. Dyer, J.

Burnett, C. J.; Chattin & Creson, JJ;
Harbison, SJ;
Concur

Robert-Arthur Management Corp.,
Appellant,

vs.

State of Tennessee, ex rel. Phil M. Canale, Jr., District Attorney General,
Appellee.

} Shelby Criminal.

Petition to Rehear.

Appellant, Robert-Arthur Management Corporation, has filed a courteous and sincere petition to rehear. This petition does not raise any issue or cite any authority not given careful consideration in preparation of our original opinion. The petition to rehear is denied.

.....

Ross W. Dyer, J.

Burnett, CJ; Chattin & Creson, JJ;
Harbison, SJ;
Concur

APPENDIX B

In the Criminal Court of Shelby County, Tennessee,
Division Four.

State of Tennessee, ex rel. Phil M. Canale, Jr., District Attorney General,

vs.

Robert Arthur Management Corp., a Tennessee Corporation, Owner and/or Operator of the Strand Theatre.

No. .....

Finding of Fact.

This matter was instituted by Phil M. Canale, Jr., District Attorney General for the Fifteenth Judicial Circuit of the State of Tennessee, on May 20, 1966, by the filing of a Petition herein. The Petitioner alleged that the Robert Arthur Management Corporation, hereafter referred to as Defendant, was exhibiting an obscene movie, to-wit, Mondo Freudo, and an obscene trailer. The said petition sought injunctive relief, both temporary and permanent, and the ultimate confiscation and the destruction of the said obscene film and trailer pursuant to the procedures of T. C. A. 39-3005.

This Court heard witnesses presented by the Petitioner on May 20, 1966, for the purpose of obtaining a temporary injunction against the above styled defendant. Said temporary injunction was granted as prayed for by the Petitioner and was subsequently modified on Motion of the Defendant to enjoin the Defendant from showing the film "Mondo Freudo" and the trailer "Olga's Girls". The Court, sitting as a trier of fact in this matter, at its own request, viewed the film "Mondo Freudo" on June 13, 1966, at a private filming. The Defendant herein filed an

Answer on Monday, June 13, 1966, and the matter came on to be heard on June 15, as required under Section 39-3005, T. C. A. Said hearing was for a permanent injunction as prayed for in the Petition against the above styled defendant.

The Petitioner presented some six (6) witnesses, who had viewed the film "Mondo Freudo" and the trailer "Olga's Girls". The witnesses are members of the community of Memphis, Shelby County, Tennessee, and viewed the film at the request of the Memphis Police Department. The witnesses represented an adequate cross section of the community, consisting of an investment salesman, personnel director for a hospital, two housewives, a real estate salesman, and a medical doctor. Other members of the community viewed the movie, but their testimony was not presented by the State as they stated it would be cumulative. The testimony of the six (6) witnesses presented by the Petitioner was substantially the same and in essence was that they viewed the film "Mondo Freudo" and the trailer "Olga's Girls", and that both the film and the trailer appealed as a whole to the prurient interest of the average person, that they were patently offensive to the public, that they went substantially beyond the customary limits of candor, and that they were devoid of any literary, scientific, educational, or artistic value, and that they did not find any social importance in either the film or the trailer, and in considering the film and the trailer as a whole, that in their opinion the film and the trailer are obscene. The witnesses further testified that they had lived in the community for time ranging up to thirty (30) years and that they were familiar with the community standards. They further testified that minors were seen in the theatre house ranging in ages apparently down to fourteen (14) years and that there was no apparent limiting of the ticket sale to adults. They further testified that the advertising of the Strand Theatre was designed to appeal to the prurient interest.

The defendant, the Robert Arthur Management Corp., who owns and operates the Strand Theatre located on Main Street in Memphis, Shelby County, Tennessee, presented some nine (9) witnesses, consisting of two (2) officers of the corporation, one who resides in Atlanta, Georgia, the other who resides in New Orleans, Louisiana; a psychiatrist and a psychologist; both residents of Memphis, Shelby County, Tennessee; and the depositions of a theatre manager who resides in Memphis, Shelby County, Tennessee; the deposition of a former movie reviewer for the Atlanta Constitution, who resides in Atlanta, Georgia; the deposition of a booking agent who resides in Atlanta, Georgia; the deposition of a Criminal Court Judge who resides in Atlanta, Georgia, and the testimony of a lawyer who resides in Memphis, Shelby County, Tennessee. The testimony of the defense witnesses were substantially the same, in essence contradicting the Petitioner's testimony that the movie did not appeal to the prurient interest, was not patently offensive, did not go beyond the customary limits of candor; and while the defense witnesses were not clear as to any artistic, scientific, or literary value, they did state in essence that it had educational value and some social importance. It is significant to point out that the value placed on the film by the defense witnesses as educational and having social importance was only of an informative nature, that is, the film only informed. The defense witnesses in toto testified that the film was not obscene. Six (6) of the defense witnesses testified that they were familiar with the community standards of Memphis, Shelby County, Tennessee, and the community standards of the nation as a whole. Three (3) of the defense witnesses testified that they were not familiar with the community standards of Memphis, Shelby County, Tennessee, but were familiar with the standards of the nation as a whole. There was further testimony in length about various activities in the nation, such as topless night clubs and nudist magazines, which

the Court does not feel it is necessary to go into. The Court would note at this time that the Defense did not offer any proof that the trailer "Olga's Girls", was not obscene to contradict Petitioner's proof.

As exhibits the defendants introduced their ad for the movie "Mondo Freudo"; certain nudist and other magazines; advertisements of "Mondo Freudo" in other cities; and a collective exhibit of advertisements of movies from tear sheets in other cities. In addition a stipulation was introduced by the defendants showing the present distribution of the movie "Mondo Freudo" and certain future bookings which stipulation showed the movie had already played in some sixty-five (65) other cities throughout the United States.

The Petitioner offered as rebuttal proof the testimony of a member of the Vice Squad of the Memphis Police Department, who in January of 1966, purchased as a citizen, under cover, some Nine Hundred Dollars ($900.00) worth of hard core pornography.

The above represents substantially all the proof presented by the Petitioner and the Defense in this matter.

The Court, under T. C. A. 39-3005, sitting as a trier of facts, after reviewing the testimony, finds as follows: that the film "Mondo Freudo" and the trailer "Olga's Girls", as a whole predominately appealed to the prurient interest of the average person, is patently offensive to the public, and goes substantially beyond the customary limits of candor and is devoid of literary, scientific, educational or artistic value, and is without any redeeming social importance or value. The Court further finds as a matter of fact that the film "Mondo Freudo" and the trailer "Olga's Girls" are obscene under the standards set forth by the T. C. A. 39-3005.

.....

Ben L. Hooks, Judge.

APPENDIX C.

In the Supreme Court of Tennessee.

Robert-Arthur Management Corporation, Appellant, vs. State of Tennessee, ex rel., Phil M. Canale, Jr., District Attorney General, Appellee.	}	Shelby Criminal.

Order.

This cause came on to be heard upon the appeal of Robert-Arthur Management Corporation, from the judgment of the Criminal Court of Shelby County, Tennessee granting a permanent injunction pursuant to a statute prohibiting obscene materials by the use of the injunctive process on the ground that the motion picture film "Mondo Freudo" was obscene and directing the appellant to surrender to the Sheriff of Shelby County said motion picture film and a trailer and directing the Sheriff to destroy such obscene material, and it appearing to the Court that the judgment of the Criminal Court of Shelby County, Tennessee should be affirmed. It further appearing to the Court upon statement of counsel that appellant will further pursue its remedies.

It Is, Therefore, by the Court, Ordered, Adjudged and Decreed that the motion picture film "Mondo Freudo" and the motion picture advertising trailer "Olga's Girls" are obscene and that the judgment of the Criminal Court of Shelby County, Tennessee granting a permanent injunction against the showing of said film and trailer is

affirmed and that the film and trailer shall be surrendered to the Sheriff of Shelby County, Tennessee and shall be destroyed pursuant to the Statute; provided, however, said destruction shall be stayed for a period of 90 days to allow appellant to pursue any additional remedies it may have and in the event a notice of Appeal or Petition for Certiorari has been filed within said time, the destruction of said material shall be stayed until final disposition of the cause.

The costs of the cause are adjudged against the appellant and the surety on its bond.

.....

Judge.

Approved:

.....

Attorney for Appellant,

.....

Attorney for Appellee.

Certificate.

I certify that the above is a true copy of the judgment of the Supreme Court rendered in the case therein stated and further that a Petition to Rehear in said case was filed timely and that it was considered and decided on its merits and denied on May 15, 1967, and as the custom of this court, the decision on the Petition to Rehear is made a part of the Opinion of the Court as published, and I, Bessie Buffaloe, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court at my office in the City of Jackson, this 13th day of September, 1967.

.....

Bessie Buffaloe, Clerk.

APPENDIX D.

Friday, May 20, 1966.

State of Tennessee, ex rel. Phil M. Canale, Jr., District Attorney General,

vs.

Robert Arthur Management Corp., a Tennessee Corporation, Owner and/or Operator of the Strand Theatre.

No.....

Temporary Injunction.

It Is Hereby Ordered, Adjudged and Decreed, That the defendants herein, appear and answer within the time allowed by law, but not under oath, oath to said answer being waived.

That the defendants herein are enjoined, restrained and prohibited either in person or acting through any agent, servant, representative or employee from the further showing of the movie film entitled "Mondo Freudo" or any other film or trailer until final determination of this cause.

That the defendants herein, are further enjoined, restrained and prohibited from disposing of in any manner, either the movie film entitled "Mondo Freudo", or any other movie film or trailer now in their possession without permission of this Court.

That the defendants herein, are further enjoined, restrained and prohibited from making any further acquisition of any such material.

This in Accordance With Fiat Issued This 20th day of May, 1966.

APPENDIX E.

Friday, May 20, 1966.

State of Tennessee, ex rel. Phil. M. Canale, Jr., District Attorney General,

vs.

Robert Arthur Management Corp., a Tennessee Corporation, Owner and/or Operator of the Strand Theatre.

On application of the defendants herein, through their counsel of record, Frierson M. Graves, Jr., and with the consent of the State of Tennessee, it is ordered by the Court—in chambers—that the Temporary Injunction should be modified, in that the defendants herein are further enjoined, restrained, and prohibited from showing the movie film entitled "Mondo Freudo" or any other "adult type" movie, or from disposing of the movie film entitled "Mondo Freudo" or any other "adult type" trailer, or from disposing of the movie film entitled "Mondo Freudo" or any other "adult type" movie film or "adult type" trailer in their possession without permission of this Court.

Thereupon Court adjourned until Monday morning at 9:30 o'clock.

/s/ Ben L. Hooks,
Judge.

APPENDIX F.

Wednesday, June 15, 1966.

Court met pursuant to adjournment, Hon. Ben L. Hooks, Judge presiding, whereupon the following proceedings were had to-wit:

State of Tennessee, Ex Rel.

Phil M. Canale, Jr., District Attorney General

v.

Robert Arthur Management Corp.,
a Tennessee Corporation, Owner and/or
Operator of the Strand Theatre

Order on Motion to Dissolve Injunction and Dismiss Petition

This cause came on to be heard upon the motion and amendment thereto filed by the defendant to dismiss the petition for injunction and to dissolve the injunction, and the Court after having heard argument of counsel finds that the motion to dismiss the petition should be overruled and the motion to dissolve the temporary injunction or to modify the injunction is overruled in part and granted in part. The Court finds that the temporary injunction should be so modified as to enjoin the defendant from showing the film "Mondo Freudo" and the film that was advertised in the trailers or coming attractions entitled "Olga's Girls" and that the injunction as heretofore granted is so modified.

It is, Therefore, Ordered, Adjudged and Decreed That the motion to dismiss the petition on the grounds stated in the motion and the motion as amended is overruled, and the motion to dissolve the temporary injunction is

overruled, except as here modified; that the defendant under the injunction as modified is enjoined, restrained and prohibited either in person or acting through any agent, servant, representative or employee from further showing the movie "Mondo Freudo" or the movie "Olga's Girls" and restrained and enjoined from disposing of said film "Mondo Freudo" now in its possession without permission of this Court, to all of which both petitioner and defendant except.

Ben L. Hooks,
Judge.

6-15-1966

Approved:

Sam J. Catanzaro, Assistant Attorney General,
Attorney for Petitioner.

Frierson M. Graves, Jr.,
Attorney for Defendant.

SUPREME COURT, U. S.

679

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT-ARTHUR MANAGEMENT CORPORATION,
Appellant,

v.

STATE OF TENNESSEE EX REL. PHIL M. CANALE,
District Attorney General,
Appellee.

APPELLEE'S REPLY BRIEF.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

ROBERT-ARTHUR MANAGEMENT CORPORATION,
Appellant,

v.

STATE OF TENNESSEE EX REL. PHIL M. CANALE,
District Attorney General,
Appellee.

APPELLEE'S REPLY BRIEF.

OPINION BELOW.

This is an appeal from an opinion of the Supreme Court of Tennessee not yet officially reported, but unofficially reported in 414 S. W. 2d 638, and attached as Appendix A to the Jurisdictional Statement filed in this appeal.

JURISDICTION.

The appellee, State of Tennessee, concedes the jurisdiction of this Honorable Court in this cause by virtue of Sections 1257, 2101, and 2104, Title 28, U. S. C., as construed by this Court.

STATUTE INVOLVED.

The statute involved is Sections 39-3005—3007, Tennessee Code Annotated, as stated and set out by counsel for the appellant.

QUESTIONS PRESENTED.

Counsel for the appellant insists that seven questions are presented in this cause, however, in his conclusion the number of substantial federal questions has been reduced to four. Counsel for the appellee insists that the questions presented by the record can be properly re-stated as follows: (1) Whether or not the statute in question contravenes the First Amendment and the Due Process Clause of the Fourteenth Amendment, Constitution of the United States, on the grounds that it constitutes a prior restraint by authorizing an injunction against the showing of the film involved pursuant to an ex parte hearing; (2) Whether or not there was sufficient evidence in the record to warrant the finding of the trial judge that the film, Mondo Freudo, was obscene; (3) Whether or not the trial judge's final decision was based in part upon evidence heard by him at the ex parte preliminary hearing and sufficient to amount to a denial of due process; and (4) Whether or not the Tennessee statute is so vague and uncertain it fails to meet the requirements of due process.

STATEMENT OF THE CASE.

The statement of the case is as stated by counsel for the appellant and the questions presented were in substance as presented to the Tennessee Supreme Court.

THE EVIDENCE.

The evidence in this cause heard by the trial judge was summarized in a finding of fact which has been made a part of the Jurisdictional Statement as Appendix B.

The Supreme Court of Tennessee, in addition to considering the evidence in the record from the trial court,

also viewed the film and made a finding with respect to it, as follows:

> "We have reviewed the evidence and have seen the film. We agree with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific of artistic value and utterly without social importance."

Jurisdictional Statement, Appendix A, Pages 24-25.

ARGUMENT.

(1) The Tennessee statute is not substantially different from the New York statute on the same subject upheld by the United States Supreme Court in the case of **Kingsley Books v. Brown,** 354 U. S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469. The procedure followed in the two cases are somewhat different in that a show cause order was issued in the **Kingsley** case and in the present case a show cause order was not issued, but there appears to be no reason why an injunction could not have issued in the **Kingsley** case without first having a show cause order. The Tennessee statute provides that when a temporary injunction is issued a trial must be held within two days after joinder of issue and a decision rendered by the Court within two days after the trial. The New York statute provides for a hearing within one day after joinder was issued in such cases and a decision within two days after the trial.

The New York Court four years after the decision in **Kingsley Books,** supra, was decided, held in **Tenney v. Liberty News Distributors,** 215 N. Y. S. 2d 663, that the New York statute did not authorize ex parte relief but postponed all injunctive relief until there had been an opportunity for an adversary type hearing. (The **Kingsley** case was decided in 1957 and the **Tenney** case in 1961.) This Court in **Quantity of Copies of Books v. State of Kansas,** 378 U. S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809, decided in 1964, adopted the New York Court's construction of the statute and seemed to relate it back to the **Kingsley Books** case, supra.

An examination of the **Quantity of Copies of Books** case, supra, and the case of **Marcus v. Search Warrants,** 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127, clearly reveals that the statutory procedure followed in those two cases

did not resemble the procedure provided for in the New York statute or the Tennessee statute now under consideration and that consequently, the holding in the **Quantity of Copies of Books** case is dicta (The Missouri statute considered in the **Marcus** case authorized a search for obscene materials, leaving the determination of what might be obscene to the discretion of the officer executing the search warrant. The Kansas statute considered in the case of **Quantity of Copies of Books** authorized the issuance of a search warrant for obscene materials only after a hearing before the issuing magistrate similar to that required by the New York and the Tennessee statute prior to issuing an injunction but allowed an elapse of ten days after seizure before an adversary type hearing could be had and there does not appear to be any requirement in the statute that a decision must be made by the judicial officer within any given time as is required in the New York statute and in the Tennessee statute).

It was observed by this Court in **Freedman v. Maryland**, 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, that it was common knowledge that films are scheduled for exhibiting and showing well in advance so that a State statute requiring a submission of the film to a censoring agency might be valid because it would not interfere with the showing or exhibiting of the film. This, it is submitted, would not be different from an ex parte hearing authorized by the Tennessee statute and the New York statute provided the hearing was held at a time so that there would be no interference with the showing of the film.

It is not insisted on this appeal that the appellant had a desire to show the film in question, Mondo Freudo, during the period between the application for the injunction and the full, complete and adversary type hearing on the question before the trial judge. The record indicates to the contrary in that counsel for the appellant did not compel a hearing within the time authorized by the statute.

If states are forbidden to enact legislation requiring a hearing similar to that authorized by the New York statute and the Tennessee statute, restraint or control over the showing of films is rendered impossible. Owners of theaters could run a film for a week or two in one community and by the time the people in the community became aware and convinced of its obscenity, the film would be sent on to another community or city, rendering injunctive relief moot and society helpless to protect itself from abuse from those who would exploit the subject of sex commercially.

(2) The trial judge heard several witnesses who considered the film to be obscene and several witnesses to the contrary. In addition to that, he viewed the film. The Tennessee Supreme Court read the testimony of these witnesses and also viewed the film. Counsel for the appellee therefore insists that the assignment of error to the effect that there is no evidence to support the judgment of obscenity is without merit.

(3) The trial judge did hear evidence prior to issuance of the injunction. This appeal would indicate that what he heard was not of sufficient significance to warrant his finding that the film was obscene and his issuance of an injunction. However, in this assignment of error, it is insisted that he was prejudiced in his final judgment because of having seen evidence on the question prior to the hearing. If this assignment of error has merit, then it would seem to justify the ex parte hearing complained of in this cause. However, counsel for the appellee submits that the trial judge was not disqualified to render judgment in this cause because of his previous information regarding the film. Such a contention would not be different from insisting that a trial judge who overruled a demurrer would be disqualified from proceeding to try the case. Even if the trial judge were prejudiced, the Ten-

nessee Supreme Court was not so prejudiced because it did not have the advance information because no evidence was presented to it except the record on appeal which it considered de novo.

(4) In reply to the fourth assignment of error this Court in the case of **Mishkin v. New York**, 383 U. S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56, held that the New York statute was not too vague in order for the defendant to have notice what the statute denounced as obscene and the Tennessee statute in question is again very similar to the New York statute in this respect. Further the Tennessee statute defines obscene material as it is defined by this Court. Section 39-3007, Tennessee Code Annotated, is as follows:

> "39-3007. Definition of obscene material—The following definition shall control in construing §§ 39-3003-39-3008:
>
> "Obscene material: Any material, matter, object or thing, including but not limited to, any written or printed matter, film, picture, drawing, or any object or thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if in addition, (a) it is patently offensive to the public or if it goes substantially beyond customary limits of candor in describing or representing such matters, and (b) it is devoid of any literary, scientific or artistic value and is utterly without social importance. The phrase 'predominant appeal' shall be considered with reference to ordinary persons. (Acts 1965, ch. 91, § 2; 1965, ch. 92, § 2; 1965, ch. 93, § 2.)"

CONCLUSION.

In view of the foregoing, the appellee insists that the appeal in this case should be dismissed and the judgment of the Tennessee Supreme Court be permitted to stand.

Respectfully submitted;

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee.

I hereby certify that a copy of the above Appellee's Reply Brief has been forwarded to the Honorable Longstreet Heiskell, Attorney at Law, 2020 First National Bank Building, Memphis, Tennessee 38103, on this the 26 day of October, 1967.

Thomas E. Fox,
Deputy Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

ROBERT-ARTHUR MANAGEMENT CORP. *v.* TENNESSEE EX REL. CANALE.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 679. Decided January 15, 1968.

PER CURIAM.

The judgment of the Supreme Court of Tennessee is reversed. *Redrup* v. *New York*, 386 U. S. 767.

THE CHIEF JUSTICE would affirm.

MR. JUSTICE HARLAN would affirm for the reasons set forth in his separate opinion in *Roth* v. *United States*, 354 U. S. 476, 496, 500–503, and in his dissenting opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455.